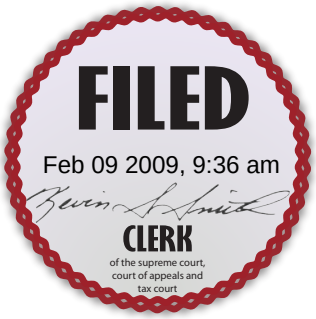

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IN THE
COURT OF APPEALS OF INDIANA

IN THE MATTER OF K.H.	)	
	)	
RIO H., Father,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 20A04-0807-JV-436
	)	
ELKHART OFFICE OF FAMILY AND CHILDREN,	)	
	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE ELKHART CIRCUIT COURT
The Honorable Terry C. Shewmaker, Judge
Cause No. 20C01-0802-JT-37

February 9, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Rio H. ("Father") appeals the involuntary termination of his parental rights to his daughter, K.H. Father challenges the sufficiency of the evidence supporting the trial court's judgment. Concluding the Elkhart County Department of Child Services ("ECDCS") provided ample evidence to support the trial court's judgment, we affirm.

Father is the biological father of K.H., who was born on July 16, 2007.[1] The evidence most favorable to the trial court's judgment reveals that on July 19, 2007, the trial court issued an order granting the ECDCS's petition requesting emergency protective custody of K.H., who was born testing positive for cocaine. The following day, the ECDCS filed a petition alleging K.H. was a child in need of services ("CHINS"), and an initial hearing on the CHINS petition was held July 30, 2007. Father appeared at the initial hearing and admitted to the allegations of the petition. The trial court then issued an order finding K.H. to be a CHINS and ordering the ECDCS to prepare a pre-dispositional report.

Following the Dispositional Hearing held on August 16, 2007, the trial court issued an order incorporating the ECDCS's pre-dispositional report and directing Father to participate in a variety of services in order to achieve reunification with K.H. These services required Father to, among other things: (1) participate in supervised visitation as recommended by the ECDCS; (2) participate in a psycho-parenting evaluation, a drug and alcohol evaluation and follow all resulting recommendations; and (3) submit to random drug screens and produce negative results.

[1] The parental rights of both Father and K.H.'s biological mother, Veronica K. ("Mother"), were terminated by the trial court on June 27, 2008. Mother, however, does not participate in this appeal. Consequently, we will limit our recitation of the facts to those pertinent solely to Father's appeal.

Father's participation in court-ordered services was inconsistent from the start. Father initially participated in supervised visitation with K.H. and attended several scheduled visits from August 2, 2007, through September 11, 2007. Shortly thereafter, Father's participation in visits were reported as "erratic." Appellant's App. p. 92. In addition, visitation supervisors felt Father was not careful enough when handling K.H., and they had to repeatedly remind Father throughout the visits to support the baby's head.

On July 19 and 31, 2007, Father tested positive for cocaine metabolites. Despite repeated attempts, ECDCS caseworker Angela Welles was unable to obtain any additional drug screen samples from Father. Father completed a drug and alcohol assessment on August 29, 2007. As a result of the assessment, it was recommended that Father participate in an eight-week intensive out-patient therapy group ("IOP") and sixteen-week aftercare program. Father attended one therapy session at Oaklawn Community Mental Health Services ("Oaklawn") on September 18, 2007, but never returned. Father was later discharged from the program on November 6, 2007, for failure to comply. Father also did not participate in a psycho-parenting evaluation despite having at least two scheduled appointments.

On October 15, 2007, Father pled guilty to two counts of class D felony fraud and one count of class D felony receiving stolen property. He was sentenced to eighteen months executed time on each count, with the sentences to be served consecutively. Father began serving his sentence in mid-November 2007.

In its six-month periodic case review report, the ECDCS informed the court that Father had not enhanced his ability to fulfill his parental obligations. Specifically, the

report indicated that Father had not cooperated with the ECDCS and had failed to make any contact with ECDCS caseworkers since the August 2007 dispositional hearing. On February 19, 2008, the ECDCS filed a petition seeking the involuntary termination of Father's parental rights to K.H.

A fact-finding hearing on the termination petition was held on June 27, 2008. Father, who remained incarcerated, appeared in person and was represented by counsel. Father testified that his current earliest possible release date is projected for February 2010. However, Father informed the court that he was awaiting trial on three separate counts of class B felony dealing in a controlled substance. At the conclusion of the fact-finding hearing, the trial court issued its judgment terminating Father's parental rights to K.H. Father now appeals.

In his brief to this Court, Father asserts that the trial court's judgment terminating his parental rights to K.H. is not supported by clear and convincing evidence. At the outset, we note that this Court has long had a highly deferential standard of review in cases concerning the termination of parental rights. In re K.S., 750 N.E.2d 832, 836 (Ind. Ct. App. 2001). Thus, when reviewing the trial court's judgment, we will not reweigh the evidence or judge the credibility of the witnesses. In re D.D., 804 N.E.2d 258, 264 (Ind. Ct. App. 2004), trans. denied. Instead, we consider only the evidence and reasonable inferences therefrom that are most favorable to the judgment. Id.

Here, the trial court made specific findings in ordering the termination of Father's parental rights. When reviewing findings of fact and conclusions of law entered in a case involving a termination of parental rights, we apply a two-tiered standard of review.

First, we must determine whether the evidence supports the findings. Bester v. Lake County Office of Family & Children, 839 N.E.2d 143, 147 (Ind. 2005). Second, we determine whether the findings support the judgment. Id. In deference to the trial court's unique position to assess the evidence, we will set aside the court's judgment terminating a parent-child relationship only if it is clearly erroneous. In re L.S., 717 N.E.2d 204, 208 (Ind. Ct. App. 1999), trans. denied; see also Bester, 839 N.E.2d at 147. A finding is clearly erroneous when there are no facts or inferences drawn therefrom that support it. D.D., 804 N.E.2d at 264. A judgment is clearly erroneous only if the findings do not support the trial court's conclusions or the conclusions do not support the judgment. Bester, 839 N.E.2d at 147.

"The traditional right of parents to establish a home and raise their children is protected by the Fourteenth Amendment of the United States Constitution." In re M.B., 666 N.E.2d 73, 76 (Ind. Ct. App. 1996), trans. denied. However, the trial court must subordinate the interests of the parent to those of the child when evaluating the circumstances surrounding the termination. K.S., 750 N.E.2d at 837. Parental rights may be terminated when a parent is unable or unwilling to meet his or her parental responsibilities. Id. at 836.

In order to terminate a parent-child relationship, the State is required to allege and prove, among other things, that:

> (B) there is a reasonable probability that:
>
> > (i) the conditions that resulted in the child's removal or the reasons for placement outside the home of the parents will not be remedied; or

(ii) the continuation of the parent-child relationship poses a threat to the well-being of the child; [and]

(C) termination is in the best interests of the child[.]

Ind. Code § 31-35-2-4(b)(2) (2004 & Supp. 2007); Ind. Code § 31-35-2-8 (2004). The State must establish each of these allegations by clear and convincing evidence. Egly v. Blackford County Dep't of Pub. Welfare, 592 N.E.2d 1232, 1234 (Ind. 1992).

Father challenges the sufficiency of the evidence supporting the trial court's judgment with regard to Indiana Code sections 31-35-2-4(b)(2)(B) and (C) set forth above. Initially, we note that Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive. Thus, although the trial court found that clear and convincing evidence supported the ECDCS's claims that there is a reasonable probability the conditions resulting in K.H.'s removal and continued placement outside Father's care will not be remedied *and* that continuation of the parent-child relationship poses a threat to K.H.'s well-being, it was required to find only that one of the two requirements of subsection (B) had been met in order to properly terminate Father's parental rights. See L.S., 717 N.E.2d at 209.

We begin our review by determining whether clear and convincing evidence supports the trial court's findings regarding Father's ability to remedy the conditions that resulted in K.H.'s removal and continued placement outside of his care. Although Father admits that he is unable to care for K.H. due to his incarceration, he nevertheless insists that the ECDCS did not present clear and convincing evidence that the conditions resulting in K.H.'s removal will not be remedied because "[t]he evidence showed Father

cared about his daughter and that he was enrolled in programs to make himself a better person and parent." Appellant's Br. p. 10.

When determining whether a reasonable probability exists that the conditions justifying a child's removal and continued placement outside the home will not be remedied, the trial court must judge a parent's fitness to care for his or her children at the time of the termination hearing, taking into consideration evidence of changed conditions. In re J.T., 742 N.E.2d 509, 512 (Ind. Ct. App. 2001), trans. denied. Additionally, the court must also "evaluate the parent's habitual patterns of conduct to determine the probability of future neglect or deprivation of the child." Id. Pursuant to this rule, courts have properly considered evidence of a parent's prior criminal history, drug and alcohol abuse, history of neglect, failure to provide support, and lack of adequate housing and employment. A.F. v. Marion County Office of Family & Children, 762 N.E.2d 1244, 1251 (Ind. Ct. App. 2002), trans. denied. The trial court may also properly consider the services offered to a parent and the parent's response to those services as evidence of whether conditions will be remedied. Id. Moreover, we have previously explained that the Department of Child Services (here, the ECDCS) is not required to rule out all possibilities of change; rather, it need establish only that there is a reasonable probability the parent's behavior will not change. In re Kay L., 867 N.E.2d 236, 242 (Ind. Ct. App. 2007).

In determining there is a reasonable probability the conditions resulting in K.H.'s removal and continued placement outside of Father's care will not be remedied, the trial court made the following pertinent findings:

3.

***

b. That there is a reasonable probability that the conditions that resulted in the removal of the child from the home of the parents will not be remedied . . . . Case manager Angela Welles testified that the child was removed from her parents because [K.H.] was born testing positive for cocaine. . . . According to case manager Welles, [K.H.] suffered from "tremor[-]like seizures" because of the cocaine in her system following her removal from the parents. The foster mother, Christy [H.], testified that another effect of the cocaine was that [K.H.] slept nearly 22 hours a day for approximately a month[.] [T]his was despite frequent attempts to wake her. There were attempts made, subsequent to the child's removal from parents, to administer drug screens to both [Mother] and [Father], but parents were unable or unwilling to follow through with most of those screens. The only tests that they were able to follow through with resulted in registering positive for cocaine. . . . The case manager testified that drug treatment was offered to both parents, but neither parent complied. [Father] is now involved in both NA and AA while incarcerated in the Elkhart County Jail, but prior to his incarceration he participated in just one treatment session in August of 2007 and then never returned to treatment. His current compliance in treatment while incarcerated is a positive step toward his long[-]term success, but too little too late for the benefit of his child. . . . Parents not only have an habitual pattern of conduct with drug abuse that pose a threat to the well[-]being of [K.H.], they also have an habitual pattern of criminal conduct that poses an additional threat to the child. [Father] testified that he was previously convicted of seven counts of armed robbery and a count of attempted murder in the State of Illinois. He is currently incarcerated in the Elkhart County Jail after admitting to two counts of fraud and one count of receiving stolen property. . . [.] [H]is earliest possible release date is presently February of 2010. In addition, [Father] is also charged with three B Felony Counts of Dealing in a Controlled Substance which is yet to go to trial[.] [B]ecause of the pending charges, the period of incarceration facing [Father] could be greatly extended, further delaying the length of time before he will be available to care for his child. . . . In addition, neither parent has established a bond with [K.H.]. . . . [F]ather's last visit with [K.H.] was before his incarceration in November of 2007. [Father] says he has attempted to bond with his daughter by writing letters and asking that [Mother] send them to the child[.] [H]e suspects the letters are somewhere

> with [Mother]. The Court finds, however, that even if the letters were sent[,] that would do little to create a bond with an infant child. By contrast, the foster family has been with [K.H.] since she was four days old. Foster mother Christy [H.] says that [K.H.] is bonded with her, her husband, and the four other children in the household. The foster family would like to formalize their relationship with [K.H.] through an adoption. To determine whether there is a reasonable probability that the conditions resulting in a child's removal from the home will or will not be remedied, the Court must judge a parent's fitness to care for his or her children at the time of the termination hearing, taking into consideration evidence of changed conditions. . . . The conditions that exist today, at the time of the Termination trial, are good in the foster home. But the conditions that exist today for the parents of [K.H.] preclude either parent from caring for their child. To reiterate, [F]ather is facing incarceration until at least 2010, maybe longer if convicted of pending charges . . . . And history suggests that the parents' inadequacies are unlikely to change.
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> * * *
>
> 4. The evidence supports termination of the parental rights of both parents in this case.

Appellant's App. pp. 9-12. A thorough review of the record leaves us convinced that sufficient evidence supports the trial court's findings set forth above. These findings, in turn, support the trial court's ultimate decision to terminate Father's parental rights to K.H.

The record reveals that, at the time of the termination hearing, Father had failed to accomplish a majority of the dispositional goals set during the underlying CHINS proceedings. Specifically, Father still had not successfully completed an IOP substance abuse treatment program, participated in a psycho-parenting evaluation, or submitted to random drug screens that produced negative results. Of particular significance, Father,

who admitted to having an extensive criminal history that included seven convictions for armed robbery and one conviction for attempted murder, was incarcerated at the time of the termination hearing on two felony counts of fraud and one felony count of receiving stolen property with a projected release date of February 2010. In addition, Father was awaiting trial on three B felony counts of dealing in a controlled substance, each of which carries a penalty of a fixed term of imprisonment between six and twenty years, with the advisory sentence being ten years incarceration. See Ind. Code § 35-50-2-5 (2004 & Elec. Update 2007). Father was therefore unavailable to parent K.H. at the time of the termination hearing, and he will remain so until February 2010 at the earliest, with the potential for remaining unavailable for decades to come. As previously explained, when determining whether a reasonable probability exists that the conditions resulting in a child's removal from the home will not be remedied, the juvenile court must judge a parent's fitness to care for his child at the time of the termination hearing. D.D., 804 N.E.2d at 266.

When questioned during the termination hearing as to whether the conditions leading to K.H.'s removal still existed, Welles replied, "Yes." Tr. p. 32. When further questioned as to whether she believed that these conditions will be remedied, Welles responded, "No." Id. Welles went on to explain that Father had never contacted her to discuss the possibility of completing services or obtaining visitation with K.H. while incarcerated. In support of her recommendation to terminate Father's parental rights to K.H., Welles further stated, "[Father] continues to be incarcerated. He . . . can't care for a child in jail. He can't provide for [K.H.], and he won't be out of jail until . . . February

of 2010." Id. When asked if she believed there was something more she could have done to reunify the family, Welles replied, "No." Id. at 35.

"A pattern of unwillingness to deal with parenting problems and to cooperate with those providing services, in conjunction with unchanged conditions, supports a finding that there exists no reasonable probability that the conditions will change." Lang v. Starke County Office of Family & Children, 861 N.E.2d 366, 372 (Ind. Ct. App. 2007), trans. denied. Moreover, this Court has previously recognized that "[i]ndividuals who pursue criminal activity run the risk of being denied the opportunity to develop positive and meaningful relationships with their children." Matter of A.C.B., 598 N.E.2d 570, 572 (Ind. Ct. App. 1992). Based on the foregoing, including Father's significant and lengthy criminal history, his current incarceration, and his non-compliance with court-ordered services, we conclude that the trial court's findings set forth previously, as well as its ultimate determination that there is a reasonable probability the conditions resulting in K.H.'s removal and continued placement outside of Father's care will not be remedied, are supported by clear and convincing evidence.[2]

We next turn our attention to Father's allegation that the ECDCS failed to provide sufficient evidence to establish that termination of his parental rights is in K.H.'s best interests. We are mindful that, in determining what is in the best interests of a child, the trial court is required to look beyond the factors identified by the Department of Child

[2] Having determined that the trial court's conclusion regarding Father's future inability to remedy the conditions resulting in K.H.'s removal from his care is supported by clear and convincing evidence, we need not also determine whether the trial court's conclusion that continuation of the parent-child relationship poses a threat to K.H.'s well-being is likewise supported by sufficient evidence. See L.S., 717 N.E.2d at 209 (explaining that Indiana Code section 31-35-2-4(b)(2)(B) is written in the disjunctive).

Services and look to the totality of the evidence. McBride v. Monroe County Office of Family & Children, 798 N.E.2d 185, 203 (Ind. Ct. App. 2003). In so doing, the trial court must subordinate the interests of the parent to those of the child. Id. The court need not wait until a child is irreversibly harmed before terminating the parent-child relationship. Id. Moreover, we have previously held that the recommendations of the casemanager and court-appointed advocate to terminate parental rights, in addition to evidence that the conditions resulting in removal will not be remedied, is sufficient to show by clear and convincing evidence that termination is in the child's best interests. In re M.M., 733 N.E.2d 6, 13 (Ind. Ct. App. 2000).

In addition to the findings set forth previously, the trial court made the following additional pertinent findings in deciding that termination of Father's parental rights is in K.H.'s best interests:

> 3.
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> * * *
>
> c. Termination of the Parent[-]Child Relationship is in [K.H.'s] best interest[s]. The CASA, and case manager both testified that [K.H] needs a permanent home in order to thrive and [to] reach her potential. Both testified that [K.H.] needs to be provided for and needs to know where she will be tomorrow. The parents are unable to provide for the child's needs presently, and they are not likely to be able to provide for her in the near future. All of this is contrary to the well[-]being and best interest[s] of the child. In addition, the foster family where the child has been placed since she was four days old is interested in adopting [K.H.]. [K.H.] is bonded with the family. And for that reason, and for the reason that the biological parents have been and are unable to provide for the child, it is in [K.H.'s] best interest[s] that termination occurs so that adoption can become a possibility. [Father] plead that he wants a chance to raise a child. He stated he missed the opportunity to raise his older children because of [his] incarceration, and now he wants to raise

> [K.H.]. While the Court finds [Father's] pleas to be sincere, and finds that maintaining the parent[-]child relationship is probably in his best interest, [Father's] interests cannot circumvent the needs of his child. [Father's] current incarceration would force [K.H.] to linger in the system, perhaps indefinitely, if she is to wait for her father's release. Time is of the essence in the life of a child. It is in her best interest[s] that permanency be achieved sooner, not later.

Appellant's App. pp. 11-12. The evidence supports these findings.

Welles testified that she felt termination of Father's parental rights is in K.H.'s best interests. In so doing, Welles informed the court that K.H. had been in the same adoptive home since she was four days old and that K.H. had not bonded with her biological parents. Welles further stated, "[I]t would be detrimental for [K.H.] to be removed from the people she has bonded with. . . . [A]nd to wait two years for her father to get out . . . [i]t could be quite traumatic at three years old for this child to move back with parents that she doesn't even know." Tr. at 45. When asked why it would be so detrimental for K.S. to be reunited with Father sometime in the future, Welles explained:

> [K.H.] has spent the last year bonding and being cared for by the foster home. It would be like thinking that this person that has raised you, these people that you've lived with, these people who have become your brothers and sisters, as you grow older you bond with them as if they're you[r] biological [family], you know, an innate human need. And for us to break that bond with the child that has known . . . nothing other than that, it would be like jerking her away from her family . . . . It's very difficult for a child to make that kind of transition.

Id. at 46. Similarly, in recommending that Father's parental rights be terminated, court-appointed special advocate ("CASA") Reva Noel testified, "I have not heard anything today that would persuade me from believing that termination is in [K.H.'s] best interests

. . . . She deserves to be in a home where she knows she's going to go to sleep and wake up in the same place and the same people are going to be there." Id. at 105-06.

Based on the totality of the evidence, including Father's continuing incarceration and his failure to complete or benefit from the services available to him throughout the duration of the CHINS proceedings, coupled with the testimony from both Welles and Noel recommending termination of Father's parental rights, we conclude that there is ample evidence to support the trial court's conclusion that termination of Father's parental rights is in K.H.'s best interests. See, e.g., In re A.I., 825 N.E.2d 798, 811 (Ind. Ct. App. 2005) (concluding that testimony of the CASA and family case manager, coupled with evidence that conditions resulting in continued placement outside the home will not be remedied, is sufficient to prove by clear and convincing evidence termination is in child's best interests), trans. denied.

Conclusion

Since the time of K.H.'s removal, Father has failed to make any significant improvement in his ability to care for his daughter. In addition, by choosing to continue to participate in criminal activity resulting in extended periods of incarceration, Father has prolonged his inability to provide K.H. with a safe and stable home until 2010, at the earliest. It is unfair to ask K.H. to continue to wait until Father is able to obtain, and benefit from, the help that he needs. See In re Campbell, 534 N.E.2d 273, 275 (Ind. Ct. App. 1989) (stating that the court was unwilling to put the children "on a shelf" until their mother was capable of caring for them).

A thorough review of the record leaves this Court convinced that the trial court's judgment terminating Father's parental rights to K.H. is supported by clear and convincing evidence. Accordingly, we find no error.

Affirmed.

ROBB, J. and CRONE, J. concur